In the Supreme Court of the United States.

OCTOBER TERM, 1915.

WILLIAM W. WHITE, APPELLANT,
v.
THE UNITED STATES, APPELLEE. } No. 153.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The petition herein was dismissed by the Court of Claims on the Government's demurrer thereto. This is a class case.

Appellant graduated from the Naval Academy in 1888. On the 30th day of June, 1905, at which time he was a lieutenant commander, appellant was transferred to the retired list with the rank and three-fourths the sea pay of a commander. This transfer was at the request of appellant, and in accordance with law. Simultaneously with his retirement he was detailed to active service until the 31st day of October, 1911, when he was ordered home. From the 30th day of June, 1905, until the 31st day of

October, 1911, he received the pay and allowance of a lieutenant commander on the active list.

Appellant's position is that as he was retired as a commander he became, by virtue of the act of March 4, 1913 (37 Stat. L. 891), upon being detailed to active service, entitled to the same pay and allowances as a commander, and he therefore claims the difference between a commander's pay and the pay and allowances of a lieutenant commander from June 30, 1905, to October 31, 1911.

The Government maintains that the act of March 4, 1913, does not comprehend the status of officers on the retired list who may be detailed to active service subsequent to their retirement; that their status is controlled solely by the acts of June 7, 1900 (31 Stat. 703) and August 22, 1912 (37 Stat. 328, 329).

BRIEF OF ARGUMENT.

Officers on the retired list are not included within the terms of the act of March 4, 1913, because:

First. The act of March 4, 1913, refers only to officers in the active service regularly advanced in grade, and does not contemplate officers on the retired list specially detailed to active duty.

Second. Appellant's status is determined solely by the act of June 7, 1900.

ARGUMENT.

The single question presented is whether the act of March 4, 1913, grants to officers promoted upon retirement the full pay and allowances of their pro-

motion grades when subsequently detailed to active duty.

The statutes involved in the consideration of this question are as follows:

Act of June 7, 1900 (31 Stat. 703):

> During a period of twelve years from the passage of this act any naval officer on the retired list may, in the discretion of the Secretary of the Navy, be ordered to such duty as he may be able to perform at sea or on shore, and while so employed *shall receive the pay and allowances of an officer of the active list of the grade from which he was retired.* [Italics ours.]

Act of August 22, 1912 (37 Stat. 328, 329):

> Hereafter any naval officer on the retired list may, with his consent, in the discretion of the Secretary of the Navy, be ordered to such duty as he may be able to perform at sea or on shore, and while so employed in time of peace shall receive the pay and allowances of an officer of the active list of the same rank: *Provided*, That no such retired officer so employed on active duty shall receive, in time of peace, any greater pay and allowances than the pay and allowances which are now or may hereafter be provided by law for a lieutenant, senior grade, on the active list of like length of service: *And provided further*, That any such officer whose retired pay exceeds the highest pay and allowances of the grade of lieutenant, senior grade, shall, while so employed in time of peace, receive

his retired pay only, in lieu of all other pay and allowances.

Act of March 4, 1911 (36 Stat. L. 1354):

> That commissioned officers of the Army, Navy, and Marine Corps on the retired list whose rank has been or shall hereafter be advanced by operation of or in accordance with law shall be entitled to and shall receive commissions in accordance with such advanced rank.

Act of March 4, 1913 (37 Stat. L. 891, 892):

> That all officers of the Navy who, since the third day of March, eighteen hundred and ninety-nine, have been advanced or may hereafter be *advanced in grade or rank* pursuant to law shall be allowed *the pay and allowances* of the higher grade or rank from the dates stated *in their commissions.* [Italics ours.]

FIRST.

The act of March 4, 1913, refers only to those regularly advanced in grade and not to those specially detailed to active duty after retirement.

The Government maintains that if it shall appear that the act of March 4, 1913, does not refer to retired officers subsequently detailed to active duty, then appellant's status is determined by the act of June 7, 1900, which would not give him the pay and allowances of the grade to which he was promoted on retirement during the special detail to active service. In order to become a beneficiary under the act of 1913 an officer's status must meet three conditions: (1) He must be advanced in grade; (2) his

advance must grant him not only pay, but also "*allowances,*" and (3) his advance must be evidenced by a commission. In the usual course appellant was simultaneously promoted and retired. After his retirement he was detailed to active duty. The detail followed immediately after his retirement, but it was a separate and distinct thing. Nowhere can it be found that the detail to active duty following retirement constitutes an advance in grade or rank. If it did constitute an advance in grade or rank, then the line of demarcation between that of an officer in the active service and one on the retired list would be wiped out by this act of March 4, 1913.

It is incomprehensible that Congress would intend to annihilate this line of demarcation after all the years of emphasis upon it.

This would be so revolutionary as to permit all officers on the retired list since 1889, who have been advanced, to receive allowances, whether detailed to active service after retirement or not. It would also affect all officers now in the active service upon their retirement, by giving them allowances when retired, whether assigned to active duty or not.

The desire of Congress to indicate that this act was not intended to include officers on the retired list is further demonstrated by the fact that it allows "pay and allowances" to all officers coming within its purview. Whereas only officers on the active list receive allowances. Officers on the retired list receive pay only, except when detailed to active duty. Hence the obvious intention in the act of 1913

was to include only those actively in the service and not those specially detailed from retirement to active service.

The third indication of the intention to include only officers in the active service and not those specially detailed from retirement is that this act allows the pay and allowances of the higher grade or rank to start from the dates stated in the "*commissions*" of the officers. The detail of an officer does not call for a commission. It is true that a commission is now given to officers in retirement who were promoted to a higher grade before their retirement under the act of March 4, 1911, as follows:

> That commissioned officers of the Army, Navy, and Marine Corps on the retired list whose rank has been or shall hereafter be advanced by operation of or in accordance with law shall be entitled to and shall receive commissions in accordance with such advanced rank. (36 Stat. L. 1354.)

This act was undoubtedly passed to comply with the sentimental desires of officers on the retired list who had served during the Civil War and had been advanced to rank and pay upon retirement, but had received no commissions as evidence of their advancement. Attorney General Moody (Attorney General's Op. Vol. XXV, p. 185) had rendered an opinion that although these officers had been advanced on the rolls and received the pay of the higher rank, that nevertheless they were not entitled to commissions. (Wood *v.* United States, 107 U. S.

414.) Thereupon the above act was passed to supply this omission.

It is obvious that a detail to active service after the retirement is purely an order from the Secretary of the Navy, and no commission issues. This alone would seem to foreclose appellant's contention that he is included within the act of March 4, 1913, as he received no commission for his detail to active service.

The act of 1913 deals specifically with the grades of naval officers advanced in grade and the commencement of the higher pay of the grade attained by advancement, and not at all with rates of pay or with the duties of naval officers, not even ordinary duty, and much less with extraordinary or special duty.

If further elucidation be necessary, reference is made to the interpretation of this act as placed upon it by Congress.

An examination of the reports of the Naval Committees of the House and Senate of the Sixty-second Congress will show that it was the indisputable purpose and intent of those committees to limit the provision of the act of March 4, 1913, to officers of the lowest grades in the Navy. The provision, which was finally enacted into law as a proviso to the naval appropriation bill approved March 4, 1913, had been added as an amendment to the appropriation bill the preceding year, in 1912, but was stricken out of the bill on a point of order as being general legislation. (See Senate Rept. No. 1217, 62d Cong., 3d sess.) Subsequently the provision was introduced in both

houses as a separate bill (S. 7278 and H. R. 25715, 62d Cong.) and favorably reported out of the Naval Committees of both houses. (House Rept. No. 1089, 62d Cong., 2d sess.; Senate Rept. No. 1217, 62d Cong., 3d sess.) These reports are practically identical, the Senate committee having incorporated the House report in its own report. On the strength of these reports the exact and identical language of the bill was incorporated by the Senate Naval Committee in the then pending naval appropriation bill, accepted by the House in conference, and enacted into law March 4, 1913.

The following language appears in both reports:

> The Committee on Naval Affairs, to whom was referred the bill (H. R. 25715) providing that the pay of officers of the Navy shall commence from the date they take rank, reports the same favorably, with a recommendation that the bill do pass.
>
> This bill was included in identically the same language by the House Committee on Naval Affairs in the naval appropriation bill of this session, but was stricken out in the House on a point of order as new legislation. It was reinserted in the naval appropriation bill by the Senate Committee on Naval Affairs upon the request of the Secretary of the Navy and again stricken out on a similar point of order when the appropriation bill was before the Senate.
>
> Under existing laws all officers in the Navy promoted in course to fill vacancies receive the pay of the advanced grade from the date

they take rank, as stated in their commissions, under the act of June 22, 1874 (18 Stat. L. 191), as follows:

"That on and after the passage of this act any officer of the Navy who may be promoted in course to fill a vacancy in the next higher grade shall be entitled to the pay of the grade to which promoted from the date he takes rank therein, if it be subsequent to the vacancy he is appointed to fill."

Consequently the only officers now in the Navy who do not receive the pay of their grade from the time they take rank as stated in their commissions are the youngest officers, who are appointed to the lowest grade and consequently not promoted in course to fill vacancies. These officers are assistant paymasters, assistant naval constructors, assistant civil engineers, ensigns, and chief warrant officers, as to all of whom the Comptroller of the Treasury has decided that they are not entitled to the pay of their grade until confirmed by the Senate.

* * * * *

Your committee believes that it is only equitable that these young officers should receive the pay of their grade from the time they begin to perform the duties of their office and from the time they take rank as evidenced by their commissions.

* * * * *

It will thus be seen that Congress intended to limit this provision to officers of the active list and in particular to those officers in the lowest grades who are directly appointed thereto and not "promoted in

course to fill vacancies in the next higher grades." In other words, the general purpose of the act of March 4, 1913, was to put all naval officers not on the retired list on the same footing relative to the commencement of the pay of the higher grade attained by promotion and to allow them that pay from the dates of their eligibility to promotion as evidenced by their commissions, instead of from the dates of their actual promotion.

The status of an officer upon the retired list who is subsequently detailed to active service must then be determined by the act of 1900 or of 1912.

SECOND.

Appellant's status is controlled by the act of June 7, 1900.

The acts of 1900 and 1912 deal specifically and exclusively with special and extraordinary duties to be performed by retired officers when required by the Secretary of the Navy, and with the pay of the officers detailed; they concern the grade or rank of such officers only indirectly, if at all. Any promotion which may accompany retirement under the act of 1900 or 1912 is wholly immaterial to the assignment to active duty, since assignment to active duty necessarily presupposes retirement as a completed act before said assignment may take place.

It is obvious from the language of the act of March 3, 1899 (30 Stat. 100, sec. 11) that promotion upon retirement is incidental to the retirement, as naval officers, in the language of the act, "shall,

when retired, be retired with rank * * * of the next higher grade." It is just as obvious that the subsequent assignment to active duty is not necessary in order to complete the promotion upon retirement because, as a matter of fact, the great majority of officers promoted and retired are never assigned thereafter to active duty.

If, then, the acts of 1900 and 1912, respectively, dealing with those who are retired and subsequently detailed to special duty in active service (in which case no commission is required) concern only those on the retired list, while the act of 1913 affects only those in the active service, then the acts of 1900 and 1912 deal with a separate subject, and do not conflict with the act of 1913. Furthermore, the act of 1913, being general legislation and not expressly repealing the acts of 1900 and 1912, does not repeal them impliedly, there being no irreconcilable conflict in the subjects considered.

As the act of 1900 was in force during the time for which this claim is made and as it dealt with retired officers subsequently assigned to active duty only, appellant's status is responsive to its terms.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be sustained.

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REPLY BRIEF FOR APPELLANT.

EDWARD S. McCALMONT,
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REPLY BRIEF FOR APPELLANT.

Counsel for the Government argues in his brief that the act of March 4, 1913, refers only to those regularly advanced in grade and rank and not to those specially detailed to active duty after retirement.

I.

In reply we beg to call the attention of the Court to the fact that there is nothing in the language contained in the act of Congress approved March 4, 1913, which discriminates against officers detailed to active duty after retirement.

It is an assumption on the part of counsel for the Government that finds no support in the language of the act nor in any legitimate deduction to be derived from comparing the language with previous legislation.

The appellant comes within the plain terms of the statute. A retired officer is an officer of the United States Navy, and therefore is embraced within the term "all officers of the Navy."

Appellant was advanced in rank, pursuant to law, since the third day of March, 1899, and received pay *and allowances* of the rank of Lieutenant-Commander, which he held before retirement (being on duty in the Bureau of Steam Engineering, Navy Department), but not of the rank of Commander, at which grade or rank he was retired.

It is insisted that the acts of Congress approved June 7, 1900, and March 4, 1913, clearly define appellant's rights in the matter.

Reference is made in the appellee's brief to the fact that this is a class case.

At the time of the passage of the act of June 7, 1900, when the Secretary of the Navy was given the discretionary power to assign an officer on the retired list to active duty, there were approximately eight hundred (800) officers on the retired list, as shown by the official naval registers, and from June 30, 1900, when the first detail was made of an officer on the retired list to active duty, to June 30, 1905, when the list of retired officers slightly increased in number and when the appellant was retired and immediately continued in active duty, there were fifteen (15) officers so detailed—that is to say, on an average of three a year—and of these fifteen officers so detailed but few of them were immediately transferred back to the active list—that is to say, without any intermission whatever.

The official naval registers will also show that from June 7, 1900, to June 7, 1912, when the act of June 7, 1900, expired by limitation—that is to say, during a period of twelve years—there were only about one hundred (100) officers who were transferred from the retired list to active service, so that the average number of officers who were detached from the retired list to active service averaged about

eight (8) a year during the existence of the act of June 7, 1900.

It will therefore be seen that the number of officers who are claiming the benefit of the act of March 4, 1913, are rather limited. The suggestion of the Government that this is a class case does not, however, enter into the merits of the issue.

II.

Counsel for the Government, on page 7 of its brief, suggests to this honorable court an examination of the reports of the Naval Committees of the House and Senate of the 62d Congress, to show that it was the purpose and intent of these committees to limit the provisions of the act of March 4, 1913, to officers of the lowest grades in the Navy, and quotes certain language from the report of the Committee on Naval Affairs to House Bill 25715 of the 62d Congress. This report cannot affect the decision here.

It is only in cases where the language of an act is obscure that such reports can be considered.

There is no question here of strict or liberal construction. Congress has passed a just act; the case is directly within its terms.

This report by the House Naval Committee appears to have been made during the 62d Congress, 2d session, while the Naval appropriation bill, in which is contained the provision under which appellant maintains his claim, was introduced and passed during a subsequent session of Congress.

If this report be regarded by this honorable court as material, then appellant begs to call the court's attention to the fact that there was at the same time pending in Congress other bills for the relief of retired officers of the Navy who had been detailed for active service, to wit, Senate Bill 6080 of the 62d Congress, 2d session, which reads as follows:

A BILL

For the Relief of Certain Retired Officers of the Navy and Marine Corps.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any officer on the retired list of the Navy or Marine Corps who has been or may hereafter be employed on active duty for an aggregate period of three years shall be promoted to and receive the pay and allowances of the next higher rank from the date of this act.

SEC. 2. That the President be, and he is hereby, authorized to issue commissions, on the retired list, to officers promoted under this act, and any retired officer who has been or may hereafter be detached from active duty shall, after such detachment, have the rank and three-fourths the pay to which such duty may have entitled him under the provisions of this act: *Provided,* That nothing herein shall be so construed as to restore any retired officer to the active list or reduce the rank, pay, or allowances now authorized by law for any officer of the Navy or Marine Corps.

SEC. 3. That all acts and parts of acts inconsistent with this act are hereby repealed.

and House Bill 22587, 62d Congress, 2d session, which reads as follows:

A BILL

For the Relief of Certain Retired Officers of the Navy and Marine Corps.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any officer on the retired list of the Navy or Marine Corps, who has been or may hereafter be employed on active duty for an aggregate period of three years, shall be promoted to and receive the pay and allowances of the next higher rank from the date of this act.

SEC. 2. That the President be, and he is hereby

authorized to issue commissions on the retired list to officers promoted under this act, and any retired officer who has been or may hereafter be detached from active duty shall, after such detachment, have the rank and three-fourths the pay to which such duty may have entitled him under the provisions of this act: *Provided*, That nothing herein shall be construed as to restore any retired officer to the active list or reduce the rank, pay, or allowances now authorized by law for any officer of the Navy or Marine Corps.

SEC. 3. That all acts and parts of acts inconsistent with this act are hereby repealed.

There was also pending Senate Bill 5955, 62d Congress, 2d session, which reads as follows:

A BILL

For the Relief of Certain Retired Officers of the Navy and Marine Corps.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any officer of the Navy or Marine Corps retired in accordance with law, who has heretofore been or may hereafter be employed under orders on active duty shall, for the purposes of rank, pay, and allowances, be regarded as having been restored on the day such active duty actually began to the numerical position in the grade on the active list which was occupied by him at the date of his retirement and be credited with all service rendered by him while so employed on active duty after retirement, or in case of a second or subsequent assignment to active duty to the numerical position in the grade occupied at the time when last detached from active duty, in the same manner and to the same extent as though such service has been rendered on the active list: *Provided*, That for the purposes of rank, pay, and allowances under this section retired Engineer officers employed on active duty shall be regarded as having been restored to positions on the active list

occupied by officers of the line of the Navy having the same length of commissioned service and shall be credited with service rendered after retirement as herein provided, but this act shall not have the effect of transferring any retired Engineer officer to the line of the Navy: *And provided further*, That any retired officer heretofore or hereafter employed on active duty in accordance with this section shall be promoted without examination to such rank as the number next below the position to which he may be assigned under this section has heretofore been or may hereafter be promoted during such retired officer's employment on active duty.

SEC. 2. That the President be, and he is hereby, authorized to issue commissions on the retired list to officers promoted under the provisions of this act; and any retired officer who has heretofore been or may hereafter be detached from active duty shall, after such detachment, have the rank and three-fourths the pay to which such duty may have entitled him under the provisions of this act.

SEC. 3. That the provisions of this act shall not apply to any officer of the Navy or Marine Corps above the rank of lieutenant commander in the Navy or Major in the Marine Corps, respectively, nor shall any officer be advanced under this act above such rank: *Provided*, That nothing contained herein shall be construed so as to entitle any retired officer of the Navy or Marine Corps to increased rank, pay, or allowances, prior to the date of this act, nor shall any provision of this act entitle any retired officer to be restored to the active list of the Navy or Marine Corps: *And provided further*, That nothing herein shall operate to reduce the rank, pay, or allowances now authorized by law for any commissioned, warrant, or appointed officer on the retired list of the Navy or Marine Corps.

SEC. 4. That so much of the act approved August fifth, eighteen hundred and eighty-two, chapter three hundred and ninety-one, as is in conflict with the provisions of this act, and all other acts or parts of acts inconsistent herewith, be, and the same are hereby, repealed.

The above bill was favorably reported by the Senate Committee on Naval Affairs. See Senate Report No. 710, 62d Congress, 2d session, which reads as follows:

62d Congress, 2d Session. } CALENDAR No. 633. SENATE. { Report No. 710.

Certain Retired Officers of the Navy and Marine Corps.

May 8, 1912, ordered to be Printed.

Mr. Lodge, from the Committee on Naval Affairs, submitted the following

REPORT.

(To Accompany S. 5955.)

The Committee on Naval Affairs to whom was referred the bill (S. 5955) for the relief of certain retired officers of the Navy and Marine Corps, having considered the same, report thereon with a recommendation that it pass.

The bill has the approval of the Navy Department, as will appear by the following communication to the chairman of the Committee on Naval Affairs, House of Representatives:

"Retired Officers Performing Active Duty.

"DEPARTMENT OF THE NAVY,
"WASHINGTON, *January* 18, 1912.

"MY DEAR CONGRESSMAN: I have the honor to acknowledge the receipt of your letter transmitting a bill (H. R. 1619) for the relief of certain retired officers of the Navy and Marine Corps, and requesting the views and recommendations of the Department thereon.

"The object of the bill is to give credit for active duty performed after retirement to all those officers so employed who were 'retired for disability incident to the service.' It is believed, however, that the bill should be amended by striking out the words 'for disability incident to the service,' on page 1, lines 3 and 4, and inserting in lieu thereof 'in accordance with

law,' thus including within its terms not merely a single class of retired officers who have done active duty, but all such officers who have, since retirement, performed active duty. The bill in this form would apply to all classes generally rather than to a single class specially.

"With the amendment suggested, it is recommended that the bill be given favorable consideration by the committee.

"Faithfully yours,

"G. v. L. MEYER.

"THE CHAIRMAN, COMMITTEE ON NAVAL AFFAIRS,
"House of Representatives.

The bills indicate that the novel, temporary policy of the act of June 7, 1900, which permitted compulsory assignment of retired officers to active service in time of peace, with stationary pay and allowances as of the grade from which they were retired, had come to wear, in the light of its exercise, an aspect of inequality and harshness.

The act of August 22, 1912, effected an almost complete reversal of the policy, but it did nothing in the way of alleviating the past effects of the policy condemned. The appellant submits, in view of all the conditions and circumstances, that it is not safe to conclude, as an exclusive deduction, that in enacting the law of March 4, 1913, the legislative mind was focused upon the correction of but one mischief that had occurred in the pay system of the navy.

Surely it is safe to conclude that, as the language of the act of March 4, 1913, is broad enough to connect it with the mischief recognized, in part, by the act of August 22, 1912, it is *in pari materia* with the policy of that act, and in that light that it does no more than retroactively extend the policy so as to cover the clearly observed discrimination that resulted to compulsory-service men from application of the condemned policy.

Referring again to a point touched upon in appellant's main brief to the case of the United States *vs.* Frederick W.

Hvoslef and others (237 U. S., p. 1) and that of the Thames-Mersey Marine Insurance Co., Ltd., *vs.* The United States (237 U. S., p. 19), the Government in its brief recited in detail the report of the House committee on the proposed original legislation providing for the refunding of certain revenue taxes illegally collected, which afterwards became the act of July 27, 1912 (37 Stat. L., 240), and urged that Congress intended to limit the act of 1912 to the refunding of death duties erroneously or illegally assessed under section 29 of the war revenue act, and reference was made to the legislative history of the statute.

Justice Hughes, in delivering the opinion of the court, decided that:

> "Although the pendency of one class of claims may have induced the passage of an act of Congress providing for their adjustment, the act may embrace other claims if its terms are sufficiently wide so to do * * *."

If the appellant can be brought within the plain terms of the statute he should be given judgment for the amount to which he claims he is legally and justly entitled.

The act of March 4, 1913, gives him a complete right and title to the pay and allowances of a Commander while in active service, for the act directs "that all officers of the Navy, who since the third day of March, 1899, have been advanced, or may hereafter be advanced in grade or rank, pursuant to law, shall be allowed the pay and allowances of the next higher grade or rank from the dates stated in their commissions."

The appellant's record in every detail follows the requirements of said statute.

Respectfully submitted,

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SIMON LYON,
R. B. H. LYON,
Attorneys for Appellant.